IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929

M.F.A.No.364 of 2003(C)

AGAINST ORDER NO.R2.69492/01/CT/DATED 21.2.2003 OF THE COMMISSIONER OF COMMERCIAL TAXES, THIRUVANANTHAPURAM
(ASSESSMENT YEAR 1994-95)

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APPELLANT:-

TOP CONSTRUCTIONS,
REPRESENTED BY MANAGING PARTNER,
TOP'S MANOR, PANAVELI P.O., KOTTARAKARA,
KOLLAM DISTRICT.

BY ADV. SRI.S.ABDUL RAZZAK.

RESPONDENTS:-

1. THE SALES TAX OFFICER,
   WORKS CONTRACT & LUXURY TAX, KOLLAM.

2. THE COMMISSIONER OF COMMERCIAL TAXES,
   THIRUVANANTHAPURAM.

BY SENIOR GOVERNMENT PLEADER SRI.MUHAMMED RAFIQ.

THIS MISCELLANEOUS FIRST APPEAL HAVING BEEN FINALLY HEARD ON 26/07/2007, ALONG WITH M.F.A.NO.367 OF 2003 & CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L.Dattu,C.J. & K.T.Sankaran,J.

M.F.A.Nos.364 of 2003-C, 367 of 2003-C,
368 of 2003-C & 369 of 2003-C

Dated, this the 26th day of July, 2007

JUDGMENT

H.L.Dattu,C.J.

These appeals arise out of an order passed by the Commissioner of Commercial Taxes, Thiruvananthapuram in exercise of his powers under Section 37 of the Kerala General Sales Tax Act ("Act" for short) dated 21st February, 2003.

(2) The question that falls for our consideration is whether the Commissioner of Commercial Taxes was justified in invoking his powers under Section 37 of the Act to revise an issue which was not the subject matter of a proceedings initiated by the Deputy Commissioner of Commercial Taxes under Section 35 of the Act.

(3) To answer the above issue, few facts are necessary. They are as under:

(i) The assessment years in question are 1994-95, 1995-96, 1996-97 and 1997-98. The assessing authority had completed the assessment for the assessment years 1994-95 and 1995-96 by its order dated 25.2.1999, for the assessment year 1996-97 on 20.7.1999 and for the assessment year 1997-98 on 28.2.2000.

(ii) The Deputy Commissioner of Commercial Taxes in exercise of his *suo motu* revisional powers under Section 35 of the Act had issued a show cause notice to the appellant asking to show cause why a particular turnover of the dealer should not be brought to tax, since it has escaped

assessments while the assessing authority had completed the assessments. The Deputy Commissioner was of the view that the orders passed by the assessing authority is prejudicial to the interest of the Revenue. In the show cause notice so issued, he had specifically stated the escaped turnover of the dealer which had escaped the assessments while the assessing authority had completed the assessments for the aforesaid years. In the show cause notice so issued had indicated the following irregularities said to have been committed by the assessing authority while granting certain exemptions to the dealer. They are as under:

> "i. During the year 1994-95, the total contract receipts was Rs.24013861 instead of Rs.23597705 reckoned for purpose of assessment. The turnover thus escaped assessment was Rs.416156.00.
>
> ii. The closing work in progress for the year 1996-97 and 97-98 was Rs.1550000 and Rs.8553884 respectively. This was, however, omitted to be reckoned for the purpose of assessment.
>
> iii. As regards supply of departmental materials to the assessee, no evidence was forthcoming in the assessment records to prove that such materials had already suffered tax within the State.
>
> Grant of irregular exemption, thus, resulted in escape of turnover with the resultant short levy of tax and surcharge to the extent indicated below.
>
> xx xx xx xx xx".

(iii) The assessee being aggrieved by the orders passed by the Deputy Commissioner of Commercial Taxes had preferred appeals before the Kerala Sales Tax Appellate Tribunal, Thiruvananthapuram in T.A.Nos.276, 277, 278 and 279 of 2001. The Tribunal by its common order dated 30.11.2001 had allowed the appeals.

(iv) The Commissioner of Commercial Taxes, being of the opinion that the orders passed by the assessing authority and the order

passed by the revisional authority are not only erroneous but also prejudicial to the interest of the Revenue, by invoking the powers under Section 37(2A) of the Act had issued a show cause notice to the appellant. In the notice it was indicated as under:

"1994-95	Total	Taxable
Turnover proposed to be assessed	Rs.2,40,13,861.00	Rs. 48,99,720.00
Turnover already assessed	Rs.2,35,97,705.00	Rs. 60,170.00
Escaped turnover	Rs. 4,16,156.00	Rs. 48,39,550.00
1995-96		
Turnover proposed to be assessed	Rs.3,57,06,576.00	Rs.1,68,44,734.00
Turnover already assessed	Rs.3,57,06,576.00	Rs. 1,38,000.00
		Rs.1,67,06,734.00
1996-97		
Turnover proposed to be assessed	Rs.5,50,04,222.00	Rs.1,84,63,148.00
Turnover already assessed	Rs.5,34,54,222.00	Rs. 1,04,360.00
Escaped turnover	Rs. 15,50,000.00	Rs.1,83,58,788.00
1997-98		
Turnover proposed to be assessed	Rs.4,06,08,961.00	Rs.1,83,10,894.00
Turnover already assessed	Rs.3,36,05,075.00	Rs. 81,480.00
Escaped Turnover	Rs. 70,03,886.00	Rs.1,82,29,414.00

> Total turnover escaped for the years 94-95 - 97-98 comes to Rs.5.81 crores.
>
> Details of purchase of materials had not been conceded at the time of completing original assessment. Therefore the assessments are to be completed afresh considering the purchase of materials transferred in the execution of works contract, for which detailed verification of accounts are required. The assessments completed for the years 94-95, 95-96, 96-97 and 97-98 and revision orders mentioned are prejudicial to revenue.
>
> I have examined the connected records of the case and the revision order of the Deputy Commissioner and the Tribunal order and it is found that since huge turnover has escaped from assessment, both revision order and the original assessment has to be set aside. Therefore, it is proposed to cancel the order of the Ist revisional authority and the original assessment order of the assessing authority by virtue of the powers U/s.37 of the Act.
>
> You are however given an opportunity of being heard in the matter at my office in Thiruvananthapuram at 11.00 AM on 21.12.02. Objection, if any, against the above proposals should be filed on the date mentioned above failing which the proposal contained in the matter will be confirmed without any further notice.

(v) After receipt of the notice, the appellant had filed his detailed reply and in that had contended that the issues involved in this case had already been decided by the Deputy Commissioner of Commercial Taxes and those issues had already become final and in that view of the matter, the Commissioner of Commercial Taxes has no jurisdiction or authority to invoke the powers under Section 37 of the Act.

(vi) The Commissioner after taking into consideration the contentions so canvassed, has proceeded to pass the impugned order dated 21.2.2003 and in that has stated as under:

> "But in the present case the *suo motu* proposal was issued because it was found that a substantial portion of the turnover which was escaped was not considered by the Deputy Commissioner at the time of invoking section 35 of the Act since it was subsequently unearthed.

On further verification of the assessment records it is found that the total escape of taxable turnover for the year 94-95 to 97-98 is as follows:-

1994-95	Rs. 48,39,550.00
1995-96	Rs.1,67,06,734.00
1996-97	Rs.1,83,58,788.00
1997-98	Rs.1,82,29,414.00
Total	Rs.5,81,34,486.00

There was no evidence produced for the cost of departmental materials supplied. Therefore the exemption allowed in this respect is wrong. The assessments are to be completed afresh considering the purchase of materials transferred in the execution of Works Contract, for which a detailed verification of accounts are required. The assessments completed for the years 1994-95 to 97-98 and the revision orders mentioned are therefore prejudicial to revenue. All the contentions raised in the reply does not deserve any merit at all. The reply is therefore devoid of merit. As there is escaped turnover for all the years from 1994-95 to 97-98, the assessment orders as well as the revision order passed by the Deputy Commissioner, Kollam u/s.35 of the K.G.S.T.Act 1963 are set aside and the cases are remitted back to the assessing authority for fresh disposal according to law. The assessing authority is directed to finalise the assessments for all the years within 3 months from the date of receipt of this order".

(4) Aggrieved by the order so passed by the Commissioner of Commercial Taxes, the assessee is before us in these appeals filed under Section 40 of the Act.

(5) Sri. S. Abdul Razzak, learned counsel appearing for the assessee would vehemently contend before us that the issues decided by the Commissioner of Commercial Taxes were the subject matters before the first revisional authority, viz., the Deputy Commissioner of Commercial Taxes, and therefore, it cannot once again be re-looked into by the Commissioner of Commercial Taxes and, therefore, the show cause notice issued by the Commissioner of Commercial Taxes and the orders passed thereon are

contrary to the statutory provision. In support of that contention, the learned counsel takes us through the order passed by the Deputy Commissioner of Commercial Taxes, which has been confirmed by the Tribunal by its common order dated 30.11.2001, and also the issues which the Commissioner of Commercial Taxes intends to revise by invoking his powers under Section 37 of the Act. Therefore, the learned counsel would submit that the orders passed by the revisional authority is contrary to the statutory provision and also arbitrary, illegal and improper.

(6) To appreciate the stand of the learned counsel, it would be useful to refer to Section 37 of the Act. Sub-section (1) of Section 37 of the Act authorises the Board of Revenue/Commissioner to initiate *suo motu* revisional proceedings to examine any order passed by any officer subordinate to him other than the Appellate Assistant Commissioner if, in his opinion, the order so passed is prejudicial to the interest of the Revenue. Sub-section (2) of Section 37 of the Act precludes the Commissioner in exercising his powers under sub-section (1) of Section 37 of the Act, if the time for appeal against the order which the Commissioner intends to revise has not expired; the order which has been the subject matter of an appeal before the Appellate Assistant Commissioner or the Appellate Tribunal or a revision in the High Court; and lastly more than four years have elapsed after the passing of the order referred to in sub-section (2) of Section 37 of the Act. Sub-section (2A) of Section 37 of the Act is inserted by Act 21 of 1978 with effect from 1.4.1978. It widens the powers of the Commissioner for exercising his powers under Section 37 of the Act. It commences with non obstante clause. The Supreme Court in **Union of India** v. **G.M. Kokil**, 1984 (Supp) SCC 196, has observed that 'Non obstante cluase' is a legislative device which is usually employed to give overriding effect to certain provisions that may be found either in the same enactment or

some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Under this provision, the Commissioner may initiate such *suo motu* revisional proceedings and pass an order under sub-section (1) of Section 37 of the Act on any point which has not been decided in an appeal before the Appellate Commissioner, or the Tribunal or in a revision filed before the High Court. That again only means the Board of Revenue/Commissioner of Commercial Taxes is authorised to initiate *suo motu* revisional proceedings of an issue which is not dealt with or covered by the orders passed in clause (b) of sub-section (2) of the Act, if the same is prejudicial to the interest of the revenue.

(7) Having noticed the relevant provisions which has a bearing on the issue involved in these appeals, now let us notice the fact situation in the instant case and the order impugned in these appeals. In the instant case, as we have already noticed, the assessments have been completed by the assessing authority for the assessment years 1994-95, 1995-96, 1996-97 and 1997-98. The Deputy Commissioner of Commercial Taxes had exercised his revisional jurisdiction that the orders passed by the assessing authority is prejudicial to the interest of the revenue on three issues, namely, a turnover of Rs.4,16,156/- which had escaped assessment for the assessment year 1994-95 and for the assessment years 1998-97 and 1997-98 the closing work in progress in a sum of Rs.15,50,000/- and Rs.85,53,884/- respectively and lastly the issue of granting exemption by the assessing authority to the supplies effected by the State Government to the assessee/contractor. Apart from this, he had not found fault on any other issue that were decided by the assessing authority. However, the second revisional authority - Commissioner of Commercial Taxes - in his order points out the lacunae in the order passed by the revisional authority and, as we have already noticed, he has picked up

only those issues which were not the subject matter either in the appeal before the Tribunal or the issues decided by the Deputy Commissioner. In our opinion, in view of sub-section (2A) of Section 37 of the Act, the Commissioner of Commercial Taxes is fully justified in invoking his power. In that view of the matter, we do not find any error in the order passed by the Commissioner of Commercial Taxes and, therefore, the reliefs sought for by the assessee in these appeals cannot be granted. Accordingly, the appeals require to be rejected and they are rejected.

(8) However, liberty is reserved to the assessee to take up all such contentions that are available to him and to produce all such documents that are necessary to substantiate his case before the assessing authority.

(9) All pending stay petitions are also dismissed.

Ordered accordingly.

H.L.Dattu
Chief Justice

K.T.Sankaran
Judge

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